Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of: | ) | |
| | ) | |
| Safeguards to Improve the | ) | CC Docket No. 93-6 |
| Administration of the Interstate | ) | RM 7736 |
| Access Tariff and Revenue | ) | |
| Distribution Processes | ) | |

COMMENTS OF THE

OF THE

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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SUMMARY

In response to the NECA request to add "outside" directors to its Board and in response to the "safeguards" audit, the Commission should use the opportunity to reaffirm the purpose and proper regulatory structure of NECA as the agent for tariff filing and revenue disbursement of its participating LECs. In this context it should not regulate NECA more intrusively than it would any other large LEC.

The Commission should approve the additional directors as a sound management practice to increase diversity of experience and judgement. NECA should be free to establish the eligibility criteria and selection process. The non-LEC, as well as non-pooling directors, should be permitted to serve on any standing committee. The additional directors should be recognized as having the same fiduciary obligations to the association as any other Board member. The Commission should not require NECA to change the number of LEC directors or otherwise upset the current balance between subsets. A reduction in the number of Subset III directors would not adequately represent the great diversity found among Subset III companies. The Commission should permit

legitimately a major, albeit not sole factor, in rule interpretations which NECA must make. Improved procedures for timely response to interpretation requests to the Commission are needed. The proposal to provide on-line access to NECA data-bases should be rejected as unnecessary and leading to significant confusion because of the preliminary nature of much of the data.

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The National Telephone Cooperative Association ("NTCA") submits these Comments pursuant to the Notice of Proposed Rulemaking, FCC 93-25, released on February 11, 1993 by the Commission in the proceeding captioned above ("NPRM"). The Commission is seeking comments regarding possible changes in the interstate access tariff and revenue distribution processes administered by the National Exchange Carrier Association, Inc. ("NECA"). NTCA is a national association of approximately 500 small local exchange carriers ("LECs") providing telecommunications services to interexchange carriers ("IXCs") and subscribers throughout rural America. The overwhelming majority of NTCA member LECs are participants in the NECA pools.[1]

## I. INTRODUCTION

This proceeding arises partially in response to a petition filed by NECA asking to amend the access charge rules to allow two "outside" directors to serve on its Board of Directors.[2]

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[1] Those small LECs that do not directly participate in the pools, nevertheless, depend on NECA's tariff expertise, industry coordinating functions, and Universal Service Fund administration.

[2] NPRM at para. 6.

This proceeding also represents the culmination of an audit that the Common Carrier Bureau conducted in 1989 and 1990 looking into NECA's pooling operation.[3] This audit concentrated on certain data reported by several large LECs to the common line pool.[4] The Bureau has alleged that some LECs, possibly influenced by NECA directors' actions, may have submitted data that was inconsistent with the Commission's accounting, separations, and access charge rules.[5] "These actions have been terminated by Consent Decrees without any finding of wrongdoing or liability."[6]

NTCA understands the Commission's need to examine the administrative practices and the necessary checks and balances that NECA employs in its operation. The LEC members of NECA and NTCA are even more interested in assuring that NECA operates as intended. Operating as "partners" with other pool members, the LECs expect the pooling administration to be fair to all participants.

Since its inception in 1983, NECA has demonstrated excellence in fulfilling a functional role that did not exist in its current form prior to NECA's formation. At the same time as the industry was struggling to embrace a new access charge system, divestiture of the Bell system, the filing of the initial access charge tariffs, and direct Commission regulation of small

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[3] NPRM at para. 2.

[4] Id.

[5] Id.

[6] Id., footnote omitted.

LECs for the first time, NECA quickly organized and has since managed a virtually trouble-free pooling process. NECA has successfully preserved a pooling system for a continuing large segment of the LEC industry. Throughout its decade history, it has continually fine-tuned and improved its operations at decreasing budget levels.

Accordingly, in addition to affirming NECA's request for outside director authority, the Commission should use this proceeding to reassert the appropriate role of NECA. In this regard, it is significant that NECA has voluntarily made changes which, regardless of whether actually warranted, have already been responsive to the same concerns and proposals contained in the NPRM.

Moreover, the allegations contained in the Bureau's audit involve facts and circumstances that can no longer be repeated. Large LECs no longer participate in NECA pools and the support programs are firmly established. In any event, the asserted ills of the NECA tariff and pooling process alleged in the audit are largely theoretical.

With the foregoing in mind, the Commission should not move forward with any proposal that will burden NECA with rigid requirements that may have only passing or debatable benefits. NECA has shown extreme willingness to facilitate the Commission's needs, to adapt to changing requirements, and to maintain an exemplary level of credibility within the industry and with the Commission and other regulators. Sweeping changes in NECA simply are not needed. The net result of this proceeding should not

strap NECA with additional budget challenges or burden its member LECs with additional administrative costs.[7] Absent a demonstrated need, the Commission should continue to defer to NECA to adapt its pooling administration to preserve its already demonstrated effectiveness. NTCA urges the Commission to consider those suggestions that NTCA offers below and NECA volunteers in its comments.

## II. NECA SHOULD NOT BE REGULATED MORE INTRUSIVELY THAN ANY INDIVIDUAL LARGE LEC.

The NPRM suggests that the Commission believes that NECA should be required to live up to a level of responsibility, monitoring, and accountability that in many instances would result in subjecting NECA and its member LECs to a higher level of regulatory oversight than is applied to large non-pooling LECs. As NTCA's following comments indicate, in general, NECA should not be treated any differently than the Commission would treat a large LEC.

First, the Commission observes that NECA has two primary objectives, namely compliance with FCC rules and achievement of pool earnings.[8] However, these are not unique to NECA and are no different than that of any individual LEC. NECA does differ from an individual LEC in its necessity to assure fairness among its pooling members. This obligation uniquely strengthens the

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[7] This proceeding should be resolved consistent with the intent expressed in CC Docket No. 92-135 to streamline tariff and pooling processes for small and mid-sized LECs. See Notice of Proposed Rulemaking, in CC Docket No. 92-135, released July 17, 1992.

[8] NPRM at para. 25.

goal of rule compliance beyond the level exhibited by non-pooling LECs.[9] The existence of this compelling goal of member fairness is strong justification for the conclusion that NECA should not be treated any more strictly, and perhaps less strictly, than non-pooling LECs which do not possess this strong internal goal.

Regulation is inherently an adversarial process between carriers and regulators. In many cases, carriers' and the regulators' public interest objectives coincide, but fundamentally, there are regulators and there are the regulated.

[redacted]

The Commission recognized this potential in the context of standards for cost study reviews:

> In the Safeguards Report, the independent auditor recommends that all LECs be subjected to the same cost study review standards, methods, and procedures, regardless of pool participation. The independent auditor states that if the review standards are different, LECs may consider the differences in choosing whether or not to participate in the pools. The independent auditorrecommends that the Commission, NECA, and the industry agree on cost study review standards, methods, and procedures for all LECs. . . .[10]

NTCA does not propose that LECs outside the NECA pooling process should be subjected to increased review, certainly not small LECs for which any possible rate impact would be infinitesimal. But the corollary is of major importance. The regulatory approach to the LECs participating in the NECA pooling process should be no more burdensome or intrusive than the Commission's treatment of large or small LECs outside the pooling process. This is not to say that NECA's unique functions, such as USF billing agent, should not be subject to regulatory oversight, but such oversight should not increase the regulatory burden on pool members over non-members.

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[10] NPRM at para. 45. The auditor suggested NECA could review non pooling small LEC cost studies. NTCA agrees with the Commission that this suggestion should not be adopted. However, the Commission's statement that ". . . we cannot properly 'outsource' to NECA the responsibility for reviewing LEC cost studies that do not affect NECA's revenue requirement or revenue distribution computation" is not entirely correct. The cost studies of every LEC in the nation affect NECA's pools revenue requirements and revenue distribution process. Long Term Support is affected by every LEC's common line costs, the Universal Service Fund is affected by every LEC's loop costs. These cost components are determined by every company's cost study, including the largest price-cap LECs.

Consistent with this equal treatment under regulation position expressed above, the comments that follow provide NTCA's input into the specific proposals contained in the NPRM. For most of the issues, NTCA's comments explain the approach the Commission should take with respect to NECA that would equate its treatment to that of a similarly sized individual LEC. NTCA urges the Commission to consider these comments fully before moving forward with any proposals that could be counter-

B. The Commission Should Maintain The Current Relative Number Of Subset Board Members.

D. NECA'S Proposal For Nominating And Selecting Non-LEC Board Members Should Be Adopted.

The nomination and selection process followed by NECA has worked well. There is no reason for the Commission to prescribe changes. NECA especially needs to retain flexibility because the pool of potential non-LEC directors may be limited.

E. Two-Year Staggered Terms For All Directors Should Be Allowed.

NECA is a stable, mature organization with over 10 years of operation; its routine is well established. As the business becomes ever more complex, two-year terms allow greater continuity. This decision should be left to NECA to decide based upon industry consensus. There are no overriding regulatory concerns requiring the government to dictate corporate function to this level of detail.[13]

and require NECA to implement this interpretive judgement. This Commission requirement ignores NECA's status as an agent and administrator by noting that NECA efforts to understand a rule's meaning should not focus on developing either an industry consensus or an interpretation that accommodates divergent LEC viewpoints.[14]

A. NECA, As Agent Of Its Member LECs, Cannot Administer Rules Without Consideration Of The Consensus Of The Industry.

First, the degree of complexity found in the application of a tri-partite system of rules with interdependent results -- Part 32 for accounting, Part 36 for jurisdictional cost separations, and Part 69 for interstate access element cost and rate development -- does not allow the degree of certainty in application that would be necessary for black and white judgements regarding compliance or to the degree the NPRM implies. In reality, the application of the rules must involve a reasonable combination of assuring consistency with the letter and spirit of the rules, uniformity and fairness among LECs in settlement pooling arrangements, and uniformity in application and results for ratepayers of different services.

Of the three sets of rules, the Part 32 accounting rules are perhaps the most definitive. The Commission's accounting rules can rely on the literature and knowledge made available by the accounting profession to help define and resolve complex financial accounting issues. These involve: (1) extensive academic involvement in the development and dissemination of

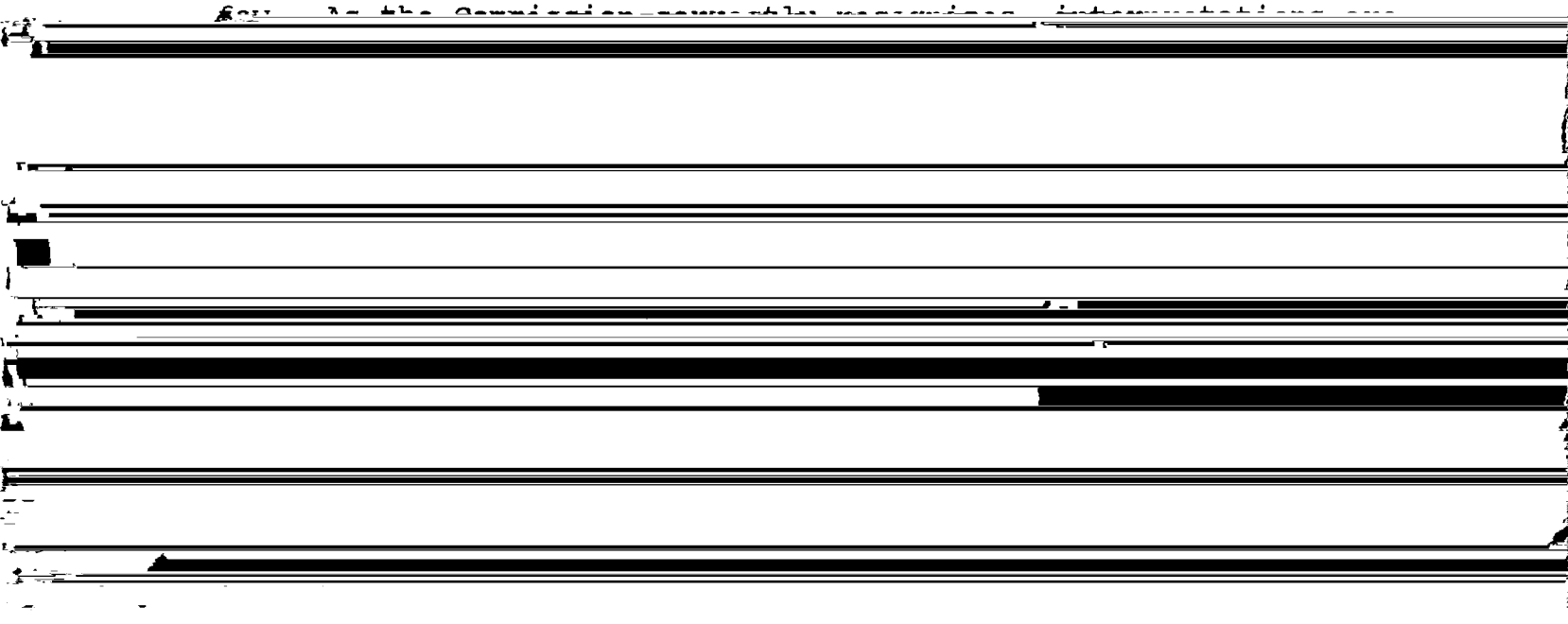
[14] NPRM at paras. 27-30.

financial accounting and reporting theory, accounting concepts discussion and practices; (2) extensive issue resolution governed by professional standards bodies and a well-organized mass of professionals; and (3) oversight of and input from numerous state and federal government agencies. As a result, a body of knowledge and an extensive background of formal reference literature exists that allows experts to determine with a reasonably high degree of confidence whether financial reporting is consistent with accepted rules.[15]

However, even the accepted rules espouse principles and standards that can be in conflict with each other or mutually exclusive in application. Fundamentally, the principles of reporting accuracy and materiality must often be reconciled. A pool of accounting experts can reasonably disagree whether an

body of experts to develop standards and principles for the application. Prior to 1984, the separations rules were essentially a private matter between AT&T, the Commission, and the National Association of Regulatory Utility Commissioners ("NARUC"). Non-Bell system LECs' involvement with these rules was primarily a private contractual matter between AT&T and independent telcos. Disputes over interpretation of contractual terms were resolved through negotiation and sometimes litigation between independents and the Bell system. Bell system and independent negotiators, in matters of application ambiguities, often arrived at different resolutions for different LECs and for LECs in different regions of the country depending on the individual Bell company involved.[16] The point is that reasonable experts have for a long time disagreed over application of the rules and reached different resolutions.

The actual text, as well as the language contained in the text of the Parts 36 and 69 rules, do not provide specific direction with respect to application and certainly not with respect to application in every situation. The rules simply are not explicit; the number of actual words are surprisingly very



and regulatory basis of these rules, together with the text of the rules and subsequent clarifications from the Commission, are nothing more in practice than conceptual directions that must be applied to an open-ended number of future possibilities. The rulemakings that adopted the rules do not explain the intended or expected application in virtually every possible case, do not always accurately define terms, and include provisions that mix and match principles with methods.[18]

The Commission has not, to date, found it productive to develop the sort of academic discussion, formal record, standards, or body of literature that would be necessary to determine with a high degree of certainty exact application methods and cost study practices. There does not exist a formal peer review process, standards body, useful issue resolution process, body of knowledge, test cases, or issue statements clarifying application of separations and access rules analogous to that found in the accounting world. Therefore, it is unrealistic to presume that the results should be as exacting or as uniform as that of accounting rules. To be realistic, a formal body of written interpretation of the Parts 36 and 69

[18] For example, the direct assignment clause contained in 47 C.F.R. § 36.1(c) and the more specific relative use provisions for jurisdictional cost allocation are difficult to reconcile in application and concept.

rules of the form that would leave no doubt over application simply does not exist to allow an independent concern, exercising isolated judgement, to determine absolute right from wrong.[19]

[redacted]

It is not reasonable to expect that all situations arising under the rules can be resolved objectively and absolutely with clear-cut interpretations. Generally accepted accounting rules, for example, allow reasonable choices among different approaches in some cases, as should the less controlling and specific separations rules in this case. The Commission should recognize this fact.

B. The Commission Should Ensure That Its Process For Ruling On Waivers And Interpretation Requests Is Timely And Responsive.

As the pace of technology changes, it can be expected that more and more issues will arise in which the "correct" application of the rules cannot be readily determined, in which the industry cannot develop consensus, or where literal application produces severe unintended consequences. Many of these will be beyond NECA's capability to resolve, or would cause unnecessary controversy. The independent auditor recommended that NECA establish an "early warning system" to alert the Commission to potential controversies and that a process be established for timely Commission action on waiver petitions or requests for clarification. NTCA does not endorse a formal "early warning" system, but suggests such warning is properly left to the sound discretion of NECA as to when the Commission should be advised of a potential controversy. A formal system would tend to promote unnecessary filings and meetings as a matter of self-defense. NTCA does agree with the urgent need for a process to resolve issues once they do come to the Commission. Such a process needs both to improve the opportunity for the

industry to explain adequately the nature of the issue (which the RAO process, for example, does not) and to provide timely rulings. The process should also be designed to operate normally in a prospective manner to avoid penalizing LECs which have made reasonable decisions which are subsequently disapproved. NTCA also agrees with the suggestion for long term simplification of the pooling process, with the caveats that there are many circumstances where accuracy is more important than simplicity, and that the matter is essentially internal to NECA and its matters and should not be prescribed by FCC rules.

First, as discussed above, in the highly complex LEC industry, no one "correct" interpretation of a rule may be apparent or even possible. Therefore, the process for resolution of difficult cases must recognize all the relevant facts which can be unique from LEC to LEC, from time to time, from one technology to another, and from one operation to another. Such a process does not lend itself, nor would it be beneficial, to formal inquiry, comments and decisions as each question arises. Moreover, it is not practical to expect the rules to change or interpretations to be issued with the same degree of speed necessary to reflect changing technological and other situations. Therefore, an approach to compliance that recognizes the great variety of circumstances but stays true to the policy intent is the only realistic way to proceed.

Unfortunately, neither the industry's nor the Commission's experience with requests for interpretation has been

satisfactory.[20] Rather, the process has resulted in delay, confusion and increased burden on the staff. Recent examples have led to unjustified cost recovery losses and penalty. Therefore, LECs are understandably reluctant to seek formal or informal interpretations. Even were the process to be improved, as we believe it can be, the current budget limitations would appear to preclude a significant increase in response time to interpretation requests.

Furthermore, NECA should not be expected to seek interpretation under circumstances that are different, or more demanding, than any individual LEC would consider for itself. A large Bell company does not ask for clarification every time two separations experts on its staff have different points of view regarding the application of the rules. Nothing different should be expected of NECA. An "early warning" system as suggested by the independent auditor should be rejected because it would be

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[20] See NECA Petition for Declaratory Ruling Pertaining to Interstate Common Line Allocation of Other Billing and Collecting Expense Under Parts 36 and 69 of the Commission's Rules, filed March 8, 1991; and Memorandum Opinion and Order, FCC 92-515, released by the Commission in AAD 91-3 on December 16, 1992; and Petition for Reconsideration filed by NTCA on January 15, 1993, in AAD 91-3. See also, Letter to Kenneth P. Moran, Chief - Accounting and Audits Division, Federal Communications Commission from William E. Stern, Vice President - Tariff Cost and Regulatory Matters, NECA, dated November 1, 1991; and revised Responsible Accounting Officer Letter No. 21, DA 92-1225, released on September 8, 1992, by the Chief of the Accounting and Audits Division; and Petition for Reconsideration and/or Clarification, filed by NTCA on October 8, 1992, in DA 92-1225.

unworkable and would invite chaos for the industry, the Commission, and the NECA pools.[21]

### C. NECA Should Not Be Expected To Impose Interpretation Resolutions On Its Member LECs That Are Any More Restrictive Than An Individual LEC Would Impose On Itself.

Consider an individual LEC situation. The LEC is faced with a difficult interpretation or application question. The rules are not explicit; several reasonable approaches exist that comply with the policy rationale in the rules. The LEC weighs the advantages and disadvantages of different approaches and decides on the one approach that most benefits its own collective interests, including compliance with the rules and credibility before the Commission. The LEC would not be expected to reject the more generous option in favor of some lesser perceived expectation.

NECA and its pooling LECs should not be asked to do anything different. NECA cannot responsibly or trustfully represent its membership if it were to be required to demand applications, where multiple methods could be deemed perfectly reasonable, that disadvantage its own members or comply with some arbitrary, perceived expectation. It seems self-evident that NECA cannot administer a pool if its members are suspicious of NECA's motives. This points to the fact that NECA's response to a

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[21] Also, NECA should not be criticized later if it were to be revealed that internal differences of opinion exist, or differences of opinion existed among its member LECs that were subsequently reconciled by internal consensus, any more so than an individual LEC would be criticized for differences of opinion among its own staff, if at all.

difference of opinion must necessarily consider the consensus of its membership. A contrary requirement would be self-destructive to NECA.

The Commission should not reject NECA member consensus so quickly as undesirable. First, it is somewhat naive not to understand that the interpretation of non-explicit rules such as the cost separations and access element rules have been and will continue to be based on a large cross-section consensus resolution within the industry, in conjunction with Commission staff input. Furthermore, recent experience indicates that the Commission, itself, uses its own ideas about industry consensus to interpret its own rules.[22] At any rate, the interpretation of cost separations rules, as these rules are put into practice, is nothing more than an elaborate form of consensus building within the industry.

## V. THE COMMISSION SHOULD NOT REQUIRE NECA TO PROVIDE ON-LINE ACCESS TO ITS DATA BASES.

The proposal for on-line access to NECA data bases should be rejected for several reasons.[23] In the first place, it would place another incentive on small LECs to leave the pools, while providing little relevant data to the Commission. The NECA data bases include data that is often preliminary or involves

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[22] In AAD 91-3, the Commission used the "consensus" comments of four parties to determine that five percent should be the interstate common line allocation for Other Billing and Collecting expense. See Petition for Reconsideration of NTCA, filed on January 15, 1993, in AAD 91-3 at 7-12; and Memorandum Opinion and Order—Annual 1990 Access Tariff Filings, 4 FCC Rcd

projections to varying degrees. Making this preliminary data accessible would delay the pooling and rate setting process and confuse the regulatory oversight. The Commission already gets "finalized" data in mechanized format from NECA and can obtain any other data reasonably required. Finally, experience in the computer industry indicates that security cannot be assured.

## VI. CONCLUSION

The goal of this proceeding to improve the tariff and revenue distribution processes of NECA by assuring independent input and assuring compliance with the Commission's rules is entirely laudable. It is in the interest of every human institution to foster diversity of input into its processes and to comply fully with all applicable regulations. Government imposed changes on an institution which has performed its difficult functions well should, however, be made with great caution to avoid upsetting a carefully crafted balance of many conflicting interests.

The introduction of competition into the interstate toll business resulted in a major increase in regulation for the non-Bell telephone industry. NECA was created for the primary purpose of creating a workable interface between the Commission and over a thousand new regulatees. Neither the wholesale rates of these carriers, nor the division of revenues within the industry, were subject to active federal regulation for almost one hundred years. The underlying philosophy of NTCA's comments is that the primary relationship between NECA and the Commission should be that appropriate to a single carrier of similar size

and composition. It should, therefore, be allowed to make changes such as adding non-LEC directors, as it sees fit.

The Commission should not impose regulatory burdens on NECA or its members that could be avoided by leaving the pools. Such action would ultimately be destructive to NECA, create an exceptional regulatory burden for the Commission, and, most importantly, deprive the public of the benefits of an effective and efficient method of organizing a large number of small carriers.

Respectfully submitted,

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